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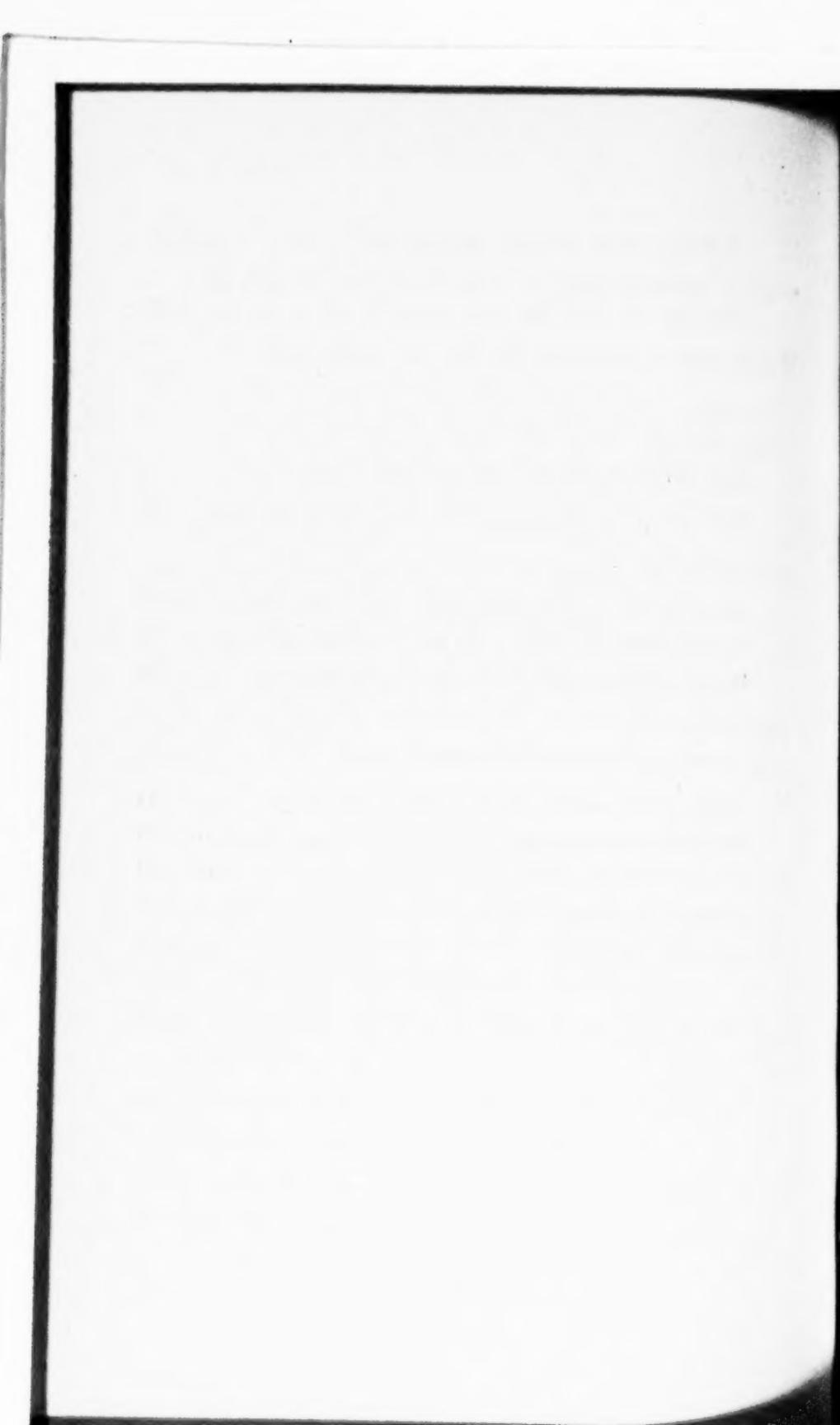
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*Argument***BRIEF IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI**

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

Respondents, Local Union 249, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an unincorporated association, hereafter referred to as "Local 249", and B. C. Mazon, Scott F. Marshall and M. Rosenthal, individually and as officers of Local 249, respectfully present the following Brief in Opposition to the Petition for Writs of Certiorari to the Supreme Court of Pennsylvania.

William E. Fife, Plaintiff and Petitioner, asks this Honorable Court to review the final judgments of the Supreme Court of Pennsylvania in an action instituted by him against the respondents above-named, and the Great Atlantic & Pacific Tea Company, a corporation, and others, for the recovery of damages alleged to have been sustained by him as a result of a conspiracy among the several defendants (*Fife v. A & P, et al.*, 52 A. 2d 24). While the Petitioner in his Statement of the Matters Involved (pages 3 to 11), sets forth his version of the facts in the case, we respectfully submit that all the questions of fact have been settled by the decision of the Pennsylvania Supreme Court: *Atchison T. & S. F. R. Co. v. Matthews, et al.*, 174 U. S. 96, 19 Supreme Court 60. The opinion of the Supreme Court was not a lengthy one, but it adopted the opinion written by Judge Richardson of the Court below (p. 39).

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and therefore incorporated by reference all of the facts found by Judge Richardson. This latter opinion is printed by the Petitioner in his Brief at pages 77 to 107, inclusive.

The jurisdiction of this Court to review a decision of the Supreme Court of a State is conferred by *Section 247 of the Judicial Code* (28 U.S.C.A. 344). No constitutional question was argued by either the petitioner or the respondents before the Supreme Court of Pennsylvania. Therefore, in order to sustain his position that this Court review the adverse judgments of the Supreme Court of Pennsylvania, the Plaintiff below must rely upon his Petition for Re-argument presented after the State Supreme Court had made its final order affirming the judgments of the Court of Common Pleas of Allegheny County. The primary question resolved itself into a simple one: Did the Supreme Court of Pennsylvania violate any constitutional guarantee in the plaintiff when it refused to grant him a reargument as prayed for?

CONSTITUTIONAL QUESTION URGED TOO LATE
FOR CONSIDERATION BY FEDERAL SUPREME
COURT

Is the petitioner estopped from urging that the action of the said Supreme Court in failing to give consideration and grant a reargument as petitioned for was itself unconstitutional? There was only one ground for reargument, and that was that Section 8 of the *Pennsylvania Act of June 2, 1937*, P.L. 1198, 43 PS 206h, was unconstitutional, being in violation of the 14th and 5th amendments to the

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Constitution of the United States and Article I, Section 2 and Article III, Section 7 of the Pennsylvania Constitution.

The general rule is that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing: *American Surety Co. v. Baldwin Company*, 287 U.S. 156 53 Supreme Ct. 98; *Godchaux Co. v. Estopinal*, 251 U.S. 179 40 Supreme Ct. 116.

In the case of *Ethel M. Dorrance, et al. v. Commonwealth of Pennsylvania*, 309 Pa. 151 (163 A. 303), this Court made the following order (53 Supreme Ct. 222):

“December 5, 1932. Petition for Writ of Certiorari to the Supreme Court of the State of Pennsylvania denied upon the ground that the federal question was not properly presented to, and was not passed upon by the Supreme Court of Pennsylvania.”

There are several exceptions to the general rule, one of which is that the rule is inapplicable where the constitutional question was considered and decided, and the other, where the grounds of the original decision below supply new and unexpected basis for claim by the defeated party of denial of a federal right: *Great Northern Railroad Company v. Sunburst Oil & Refining Company*, 287 U.S. 358, 53 Supreme Ct. 145-149. In our case the constitutional question was not considered and decided by the State Supreme Court on the petition for rehearing, because the Petition for Reargument was refused. As to whether the grounds of the decision of the State Supreme Court supply new and unexpected basis for a claim of the denial of a federal right, we will examine the said decision to ascertain whether the position taken by the petitioner can be sustained.

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The Act of 1937 P.L. 1198 is known as the "Labor Anti-Injunction Act." Section 8 of the said act, which is the section about which complaint is made, provides as follows:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of—(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization."

Obviously the applicability of this section of the Act is limited to the Union, that is, Local 249, and the three officers who are named as defendants. The Petitioner opens his argument at page 28 with the following statement:

"Section 8 of the Act of 1937 was injected into this case by the Supreme Court of Pennsylvania when the lower court had entered judgments upon the record against your Petitioner and had held that under the facts of the instant case the statute had no application. The lower court in its opinion at page 36 of the Atlantic Reporter stated: 'In this connection we may add that the plaintiff's evidence would not warrant a finding

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that there was no labor dispute at the A & P and the provisions of section 8 of the Labor Anti-Injunction Act of 1937 P.L. 1198 43 PS 206h would not be applicable in that event.' ”

The above quotation from the opinion of the Court below per Judge Richardson is only a small portion of the same. The Act of 1937 was not injected into this case by the Supreme Court of Pennsylvania, as is shown by the following quotation from the Opinion of the Court of Common Pleas as it is printed in the Petition for the writ (p. 97-98) and which will be found in 52 A 2d at page 34, and which also was quoted in our argument before the Supreme Court of Pennsylvania as set out in Brief for Appellees, Local Union 249, B. C. Mazon, Scott F. Marshall and M. Rosenthal,” at pages 45 and 46. This portion of the Opinion of the court below reads as follows:

“There is no doubt that the Union had the right to initiate a drive to unionize the A & P hauling contractors, and to promote by lawful collective action the common interest of its members.

It had the right to attempt to induce A & P to operate a ‘closed shop’ with respect to its hauling. The Union, as such, is not liable for unlawful acts of its individual officers, members or agents, unless it is established by a preponderance of the evidence that (a) such unlawful acts were done by its officers, members or agents and (b) that it actually participated in or authorized such acts, or ratified them after actual knowledge: Act of June 2, 1937, P.L. 1198, sec. 8, 43 PS §206h.

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The Union, however, would be liable if it entered into a conspiracy with its officers, members and others, to do an unlawful act, and particularly would it be liable if it adopted and directed a program of violence to prevent the independents from carrying out their contracts with the A & P, and became, through its officers and members, a participant in the conspiracy or ratified the agreement after actual knowledge. But it will bear repeating that mere suspicion is not evidence. And the actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question: United States v. Whiñé, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542, 152 A.L.R. 1202."

At page 34 of his argument in this court the Petitioner makes the following observation:

"The record was to be examined upon the theory by which the case had been tried in the court below", referring to *Weiskircher v. Connelly*, 256 Pa. 387 100 A. 965. He then states (page 35) :

"Was that done in the instant case? Most certainly not."

Let us see whether his conclusion is correct.

The record in this case discloses that in March of 1940 the above action was filed at Number 2679, January Term, 1940, in the Court of Common Pleas of Allegheny County, Pennsylvania. It was so proceeded in that in March of 1943 a trial was had which lasted two weeks and resulted in a record or transcript comprising 1170 typewritten pages.

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At the close of the plaintiff's case, the defendants were granted compulsory non-suits. Plaintiff moved to have them removed and when the case came up for argument his counsel, in conformity with a rule of Allegheny County Court of Common Pleas, presented to the court en banc a Statement of Facts and Questions to be argued. The latter are as follows:

1. Does Section 8 of the Labor Anti-Injunction Act of June 2, 1937, P.L. 1198, apply in this case?
2. Was a prima facie case made out against the defendants?

At the argument before the court en banc, the plaintiff's attorney not only argued the question of the constitutionality of Section 8 of the Act of 1937, but he presented to the court an elaborate brief containing 85 pages and one of the subjects argued is the matter under the following heading:

"Does Section 8 of the Labor Anti-Injunction Act (Act of June 2, 1937, P.L. 1138: 43 PS 206h) accord with the provisions of Section 11 of Article 1 of the Constitution of Pennsylvania, with the Fourteenth Amendment of the Constitution of United States, the Fifth Amendment of the Constitution of the United States, the seventeenth paragraph of Section 7 of Article 3 and Subdivision 14 of Section 7 of Article 5?"

Under this heading, plaintiff's counsel argues practically the same questions as to constitutionality which he is urging before this court, excepting, of course, the later action of the Supreme Court of Pennsylvania in not considering its Petition for Reargument.

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On December 18, 1943, the compulsory non-suits were set aside "for the reason that some of the defendants who were called as witnesses by the plaintiff were not interrogated on some of the allegations set forth in their Affidavit of defense." The Opinion in support of the order taking off the non-suits contains the following language:

"The Trial Court granted judgment of compulsory non-suit for the reason that the evidence and exhibits of the plaintiff at that time, in his opinion, did not show that the alleged conspiracy was proven by full, clear, and satisfactory testimony. See *Ballantine v. Cummings*, 220 Pa. 621; *Novic, et al. v. Fenies, et al.*, 337 Pa. 529; *Rosenblum v. Rosenblum, et al.*, 320 Pa. 103. *The Court also took into consideration the provisions of the Labor Anti-Injunction Act of 1937, P.L. 1198, and the amendment to that Act, viz. the Act of 1939 P. L. 302*, for the reason that this suit was not instituted until December, 1939, and the original Statement of Claim was not filed until April 1st, 1940."

The second trial, which began January 21, 1946, required 3,493 typewritten pages of testimony. In the Charge to the jury at page t. 3530 we find the following words:

"In order to hold the union liable as an association, you must first find that the officers and members committed unlawful acts in a conspiracy, and then you must find that the union through its members participated in or *actually authorized* those unlawful acts in the conspiracy or ratified the acts *after actual knowledge* of them, and in determining whether or not there was any ratification of the acts of

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the officers or member of the union by it, you will take into account all of the testimony which has been presented, including the oral testimony, the minutes of the meetings of the union and the actions recited therein, together with the exhibits. Plaintiff points to the payment of the hospital bills of Bohr and Rosenthal by the union, the gifts to Frankel, the reference of the independent drivers to the headquarters of the union, the actions of men wearing buttons with the number 249, and other evidence which he contends shows *actual authority and ratification* of the acts of the individual members and officers by the union itself. You will consider all of the testimony in the case in order to determine whether or not there has been *actual authority* for unlawful acts in a conspiracy or ratification of them."

Again at page t. 3547 when speaking of punitive damages, which might be assessed against the union, the charge states:

"There must be evidence, *without the aid of presumptions*, that the acts were done wilfully and wantonly by the officers and members, and that the union participated in, *actually authorized, or ratified those acts after actual notice of them by the union.*"

At the close of the charge a number of additional requests were presented by the several parties, among which was one on behalf of Local 249 and its officers to the effect, first--that there was a labor dispute between Local 249, Hannon & Kenny and the A & P Tea Company, and second, that if the jury finds that a labor dispute did

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exist between Local Union 249 and the A & P Tea Company and/or Hannon and Kenny, that no officer or member of Local 249 and neither Local 249 participating or interested in a labor dispute, shall be held responsible or liable in this civil action for the alleged unlawful acts of individual officers, members or agents except upon proof by the weight of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons, officers, members or agents of Local 249, and (b) actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof by Local 249.

The additional points were refused and exceptions noted (T. 3578).

It will be noted from the portion of the Charge quoted, that the burden placed upon the plaintiff as to actual knowledge and ratification and actual authority, actual notice, etc., is exactly the same as that required by the Act of 1937; also, when speaking of punitive damages, the trial judge instructs the jury that there must be evidence "without the aid of presumptions" that the acts were done wilfully, etc., following the exact wording of the Act of 1937. After almost 100 hours deliberation, the jury was unable to reach an agreement and was discharged by the trial judge. Motions for judgment upon the whole record under the Pennsylvania Act were then made and granted, the opinion written by Judge Richardson is the one printed in the plaintiff's Petition for Certiorari now before the court (p. 77-107). While the Act of 1937 was referred to by the defendants in their briefs before the lower court, the question of the constitutionality of Section 8 of the said act

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was not raised by the plaintiff in his argument, oral or written contra the judgments. Upon his appeal to the Supreme Court of Pennsylvania, he again failed to bring before that court the question of the constitutionality of Section 8 of the Act of 1937. The opinion of the Supreme Court, which adopted the opinion of the Common Pleas Court will be found in 52 A 2d 24 as above noted.

When he presented his petition for reargument, plaintiff made the following pertinent statement (p. 75) :

“We further request such a reargument, or in the event of no reargument, we respectfully request this Court to deliver an opinion as to the constitutionality of the section of the Act of 1937, above referred to, in order that the record in this case may be perfected for an appeal to the Supreme Court of the United States of America.”

Taking into consideration the above facts and that Section 8 of the Act of 1937 had been continually before the parties and the court since the first trial in 1943 how can the plaintiff explain why he found it necessary to ask the Supreme Court of Pennsylvania on a petition for reargument after an adverse decision, to deliver an opinion as to the constitutionality of the Section of the Act of 1937, “in order that the record in this case may be perfected for an appeal to the Supreme Court of the United States of America.”

The simple answer is that after the non-suits were set aside as above indicated without the court expressing an opinion on the constitutionality of Section 8 of the said Act, the plaintiff's counsel decided to abandon that ques-

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tion and it did not occur to him that it might be important until the final judgments of the Supreme Court of Pennsylvania were entered against his client. Therefore, under the decisions of your Honorable Court, the Petition for Reargument had no legal or factual foundation upon which to rest and was properly denied.

Also, the inference that the Pennsylvania Supreme Court based its decision upon the Act of 1937, by the statement by petitioner that the said court *applied* the Act, is not borne out by a consideration of the entire paragraph embodying the sentence quoted by the Petitioner.

In referring to the Opinion of the Pennsylvania Supreme Court, he quotes the following at page 29:

“In dealing with the evidence said to support the charges against the Union and the three officers, it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202 43 PS 206h.”

The entire paragraph, as found at page 39 of 52 A 2d, reads:

“With respect to Appeal No. 144, from judgment in favor of Union No. 249, and the Appeals No. 148, 149 and 140, from judgment in favor of Mason, Marshall and Rosenthal, officers of the union, the elements of the question for consideration are somewhat different from those presented in the case against the A & P. In dealing with the evidence said to support the charges against the union and the three officers it is necessary to consider section 8 of the Act of June 2, 1937, P.L. 1198, 1202 43 PS §206h. With respect to Appeal No. 146 from the refusal to take off the non-suit entered on the

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motion of the executrix of Joseph Kenny, plaintiff encountered an additional difficulty, Kenny's death closed plaintiff's mouth. As to these four appeals, we also agree that the evidence does not measure up to what the rule requires. We realize from our consideration of the evidence and from what is said in the elaborate briefs of argument, that in presenting a case like this there was, and probably always will be, difficulty in supplying the measure of proof required by the law, but we may not for that reason relax the settled rule. We therefore adopt the opinion written by Judge Richardson; we may add that while the members of the learned court below were not unanimous with respect to Mason, Marshall and Rosenthal, we all agree that in the case of each appeal the judgment appealed from must be affirmed."

It will be noted that the Supreme Court makes the following statement:

"We realize from our consideration of the evidence and from what is said in the elaborate briefs of argument, that in presenting a case like this there was, and probably always will be, difficulty in supplying the measure of proof required by the law, *but we may not for that reason relax the settled rule.*"

As to what the "settled rule" in Pennsylvania is, we quote the Opinion from the same page

"It has long been the settled rule in this Commonwealth that proof of conspiracy must be made by full, clear and satisfactory evidence. The mere fact that two or more persons, each with the right to do a

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thing, happen to do that thing at the same time is not by itself an actionable conspiracy: *Rosenblum v. Rosenblum*, 320 Pa. 103, 181 A 583."

The case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, upon which the Petitioner relies, has no application to this case as will be seen from the following reference to the said decision:

The Supreme Court of Missouri in the case of *Laclede Land & Improvement Co. v. State Tax Commission*, 295 Mo. 298, 243 S.W. 887, had decided that the Tax Commission had no authority to hear the complaint of the Laclede Company, and that if such a power had been conferred on the commission, the statute granting it would have been in violation of the Constitution of Missouri. The Laclede case was authority until it was overruled in the Brinkerhoff-Faris case. As said by the Supreme Court of the United States at 453 in the Brinkerhoff case:

"No one doubted the authority of the Laclede case until it was expressly overruled in the case at bar. * * *

It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense.

The plaintiff asserted an invasion of its substantive right under the federal Constitution to equality of treatment. * * * In order to protect its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the state. * * *

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Under the settled law of the state that remedy was the only one available."

It was held by the Missouri State Court in the Brinkerhoff Case that no judicial remedy was open to the plaintiff other than that before the State Tax Commission, but at the date of the decision of the case, the Commission could not grant such relief to the plaintiff because the time within which it could act had long expired. Therefore, it is obvious now, in the Brinkerhoff Case the United States Supreme Court would grant certiorari and would decide the case as it did.

In our case the Pennsylvania Supreme Court did not apply the Act of 1937 in such manner that its action prevented the plaintiff-petitioner from pursuing any remedy he had prior to such decision; he met Section 8 of this Act in the very beginning of his case and it continued with him up until the final decision of the Supreme Court; he well knew this fact and also the plain unambiguous provisions of the act. The opinion of the lower court in taking off the compulsory non-suit gave him no assurance that the Act would not be applied to the new trial; the conduct of the second trial shows that it was again before all the parties. When the Supreme Court of Pennsylvania referred to the Act of 1937 in its opinion it did no more than had been previously done by the court below when it took off the compulsory non-suits. It must be remembered that the appeals before the Supreme Court of Pennsylvania were initiated not by the defendants, but by the plaintiffs. He had the right to argue that Section 8 of the Act of 1937 was unconstitutional, but he did not see fit to do so.

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If the decision of the Supreme Court of Pennsylvania in applying the Act of 1937 had been to the advantage of the Petitioner; if the Court had found that because of the Act of 1937, and the requirement of proof to be merely by the "preponderance of the evidence",—rather than by that which is "full, clear and satisfactory",—the Union and its officers would be liable for the acts of others, and if the Union and the officers had prayed for a Writ of Certiorari for the very same reason as set out by the Petitioner, your Honorable Court would most certainly have denied the same.

Taking into consideration all of the facts in the history of this proceeding relative to this Act of 1937, the petitioner cannot now, with good grace, plead surprise and claim such prejudice as would excuse his laches. We respectfully submit, therefore, that the petitioner is too late to seek relief from this Court as prayed for, and also, we urge that the Supreme Court of Pennsylvania did not base its decision upon the said act, but only mentioned it in connection with the evidence against the Union and its officers. Therefore, under the decisions of your Honorable Court, the Petition for Certiorari should be denied.

However, we will attempt to show that the Supreme Court of Pennsylvania did not violate any constitutional guarantee in the petitioner when it refused his petition for reargument.

*Argument***NO VIOLATION OF ANY RIGHT GUARANTEED TO
PLAINTIFF BY CONSTITUTION OF UNITED STATES
OR OF PENNSYLVANIA**

All of the reasons urged for granting the writs and all but number 4 of the "Questions Presented" in the Petition for Writs of Certiorari relate to the action of the Supreme Court of Pennsylvania in, as alleged by Petitioner, applying section 8 of the Act of 1937 to the case at bar. Number 4 of the Questions Presented raises the matter of the constitutionality of said section 8 of the Act of 1937. Therefore, we will first consider whether the section of the Supreme Court of Pennsylvania in thus applying section 8 of the Act of 1937 violated any provision of the Constitution of the United States.

The Petitioner alleges the sections of the Federal Constitution as violated to be the *Fifth*, *Seventh* and the *Fourteenth* Amendments.

The Fifth Amendment to the Constitution, U.S.C.A. p. 172, provides among other things, that "no person shall be * * * deprived of life, liberty or property without due process of law."

In *Palko v. State of Connecticut*, 302 U.S. 319, 58 Supreme Ct. 149, it is held that the Fifth Amendment is not directed to the States, but solely to the Federal Government, therefore it has no application to this case.

The Seventh Amendment, U.S.C.A. p. 379, provides:

"In suits at common law where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved and no fact tried by a jury, shall be

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otherwise re-examined in any court of the United States, then according to the rules of the common law."

The Petitioner sets forth that he has been prejudiced by the alleged action of the State Supreme Court in applying to his case an Act which provides rules of evidence different from those of the common law after the case had been submitted to the jury under common law rules of evidence, and in re-examining the facts other than according to the rules of the common law.

In this case, judgments on the record were entered by the court below after disagreement of the jury, as permitted by Pennsylvania Act of April 20, 1911, P.L. 70, 12 PS section 684. These judgments were affirmed by the Supreme Court of Pennsylvania, and the Petitioner does not raise any question as to the constitutionality of the said Act of 1911. There is no question but that that Act is constitutional, as well as similar action taken in a federal court under Rule 50 of the new Rules of Civil Procedure: *Domarek v. Bates Motor Transport Lines*, 93 F. 2d, 522-524, based upon *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 55 S. Ct. 890; *Galloway v. U.S.*, 319 U.S. 372, 63 S. Ct. 1077.

As to the power and authority vested in the Supreme Court of Pennsylvania to apply the Act of 1937 to the instant case and also to re-examine the facts in this common law action, other than according to the rules of the common law, we respectfully refer the court to the opinion written by Mr. Chief Justice White in the case of *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595 at 596 as follows:

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"Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable, (a) *That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action.* We select from a multitude of cases those which we deem to be leading; Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 434, 12 L. ed. 213, 223; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Brown v. New Jersey, 175 U.S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Twining v. New Jersey, 211 U.S. 78, 93, 53 L. ed. 97, 103. And, as a necessary corollary, (b) *that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same.* Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U.S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U.S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to

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say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning."

To the same effect are *Chesapeake & Ohio Railroad Co. v. Kelly*, 241 U.S. 485, 36 S. Ct. 630-631; *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226, 43 S. Ct. 589-591.

The 14th Amendment to the Constitution which is found in U.S.C.A. p. 69, provides among other things: "Nor shall any state deprive any person of life, liberty or property without due process of law."

This Amendment applies not only to the States, but also to the Courts of the State, and therefore, we will attempt to show that the Supreme Court of Pennsylvania did not deprive the plaintiff of property without due process of law, nor deny to him the equal protection of the law.

(a) DUE PROCESS

In the first part of this Brief, in urging that the Petitioner was too late in raising alleged constitutional questions, we called attention to the fact that *Section 8 of the Act of 1937*, the *Pennsylvania Labor Anti-Injunction Act*, had been before the Court and the parties hereto at all stages of the case, had been referred to in the Opinion of the Court below and in the argument for the appellee before the Supreme Court and therefore, the plaintiff must have anticipated that the Supreme Court might mention it in its opinion, as it did. This being so, the refusal to grant a

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re-argument so that the Act might be brought before it for special consideration was not a violation of the 14th Amendment, in denying this plaintiff due process. He suffered no injury by reason of the refusal of the Court to consider the constitutionality of the Act. As a matter of fact, the application of that Act would give him an added advantage over the defendants, because it required merely that he prove his case by "a preponderance of the evidence," and while the words "without the aid of any presumptions of any law or fact" are inserted in the Act, this particular provision refers only to (a) the doing of such acts by persons who are officers, members or agents of the association; and (b) actual participation in, or actual authorization of, or ratification of such acts after actual knowledge by the association. The only complaint made by the Petitioner is the use of the words, "and without the aid of any presumption of law or fact." Those words are surplusage, because the subjects to which they apply, as above noted, require evidence of the *actual* doing of such acts, participation in, authorization of, or ratification after *actual* knowledge. Striking out of the Act "and without the aid of any presumptions of law or fact," the requirement for responsibility or liability of the Union or its officers for the actions of the persons mentioned is exactly the same. In speaking of responsibility of the Union and its officers, the Common Pleas Court in the Opinion written by Judge Richardson and which was adopted by the Supreme Court of Pennsylvania as above noted, based its decision largely upon the case of *U. S. v. White*, 322 U. S., 694, 64 S. Ct. 1248 (52 A2d 24 at page 34) and this application of the Federal law was made by the Court after a reference almost verbatim to section 8 of the Pennsylvania Act of 1937. The

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decision in the White case on this particular question is as follows (p. 1252-1253) :

"Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members or trustees. The official union books and records are distinct from the personal books and records of the individuals, in the same manner as the union treasury exists apart from the private and personal funds of the members. See *United States v. B. Goedde & Co.*, D.C. 40 F. Supp. 523, 534. And no member or officer has the right to use them for criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts. See *Lawlor v. Loewe*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341; *Eagle Glass & Mfg. Co. v. Rowe*, 245 U. S. 275, 38 S. Ct. 80, 62 L. Ed. 286."

Therefore, even without the Act of 1937, the Union and its officers would be protected against what might be called respondeat superior except upon the conditions mentioned in the White case, and therefore, the Petitioner suffered

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no prejudice when the Supreme Court of Pennsylvania merely mentioned that, "In dealing with the evidence said to support the charges against the union and the three officers, it is necessary to consider section 8 of the Act of June 2, 1937, P. L. 1198, 1202, 43 PS 206h." That is every word in the Opinion as to the Act of 1937. It does not go into an elaboration of how the Act of 1937 shall be considered, but instead proceeds to finally decide the entire case according to "the settled rule" which is that "proof of conspiracy must be made by full, clear and satisfactory evidence" (Opinion p. 39).

The petitioner admits that the standard of proof required in a conspiracy case is that it be "full, clear and satisfactory". Why then is he objecting to the application of a rule of evidence which places upon him a much lighter burden of proof?

In *Snyderwine v. McGrath*, 343 Pa. 245, (22 A2d, 644 at 647), the Supreme Court of Pennsylvania adopts the following language from *Taylor v. Paul*, 6 Pa. Superior Ct. 496-501:

"To instruct the jury that a fact must be established by 'the weight of the evidence' is not equivalent to saying that it must be established 'by clear and satisfactory evidence'. The latter implies a higher degree of proof than the former."

(b) EQUAL PROTECTION OF THE LAW

Petitioner claims that he has been denied "equal protection of the law" by the application of the Act of 1937, and this, because section 8 of the Act as he alleges sets up

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a different standard of evidence when referring to associations or organizations. His position that this section might refer to any association or organization is not well taken because by the very terms of the Act, the term organization means, "every unincorporated or incorporated association of employers or employees."

In *Carras v. Monaghan*, 65 Fed. Supp. 658, the District Court for the Western District of Pennsylvania decided (p. 661) that:

"The Acts of 1937 and 1939 (Pennsylvania Labor Anti-Injunction Act) were Pennsylvania procedure statutes well within the power of the State legislature to enact. To say that the Federal constitutional rights of the plaintiff have been violated by the amending Act of 1939, (adding two exceptions to section 4 of the Act) is tantamount to declaring that the ancient chancery powers of the Pennsylvania Courts also violated the constitutional rights of individuals in case of labor disputes."

This case also holds that the "due process clause" does not guarantee to the citizen of a State any particular form or method of State procedure.

In *Dohany v. Rogers*, 281 U. S. 362, 50 S. Ct. 299 the opinion at 302 reads:

"Nor does the equal protection clause exact uniformity of procedure. The Legislature may classify litigation and adopt one type of procedure for one class and a different type for another."

In *Landay v. U. S.*, 108 F2d 695-706 (Certiorari denied, 60 Supreme Ct. 721) the Circuit Court of Appeals for the

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Sixth Circuit Court adopts the following from the opinion in *Hass v. U. S.*, 93 F2d 427-437:

"The provision of the act which prevents a retroactive application did not make the act inapplicable at the time this case was tried. *No one has a vested right in any existing rule of evidence.* Congress and the Legislatures of the States may modify and control rules of evidence and may apply new rules to pending causes of action, provided a party is not deprived of his right to present his proof."

In an action under the Interstate Commerce Act to recover from a railroad company damages sustained by a shipper by reason of unreasonable rates and unjust discrimination, it was urged that the provision of section 16 of the Act that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated upon.", is repugnant to the Constitution among other things, as a denial of due process of law. The opinion of the Supreme Court in this case, that is, *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 35 S. Ct. 328 at 335 reads

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. *At most, therefore, it is merely a rule of evidence.* It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the pro-

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ceedings upon which their validity depends. Such statutes have been generally sustained."

In *Luria v. United States*, 231 U. S. 9, 34 Supreme Ct. 101 p. 14, the Supreme Court adopts the following quotation from Cooley's Constitutional Limitations, 7th Ed. 524:

"It must also be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective, even though some of the controversies upon which it may act were in progress before."

In *Seaboard Air Line Ry. Co. v. Watson*, 287 U. S. 86 (53 Sup. Ct. 32) this Court held that the mere discrimination resulting from the application of a presumption of negligence (created by section 237 of the Judicial Code, 28 U. S. C. A. section 344), to a railroad company and the failure to provide a like rule in similar actions against carriers by motor for hire, or other litigants, did not violate the "equal protection" clause of the 14th Amendment.

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Finally, in the late case of *Kotch v. Board of River Port Pilot Com'rs.* as reported in 67 Supreme Ct. 910 (advance sheet), your Honorable Court made the following pertinent observations as to this section of the Constitution at p. 912:

"The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. * * * Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public. * * * This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities."

Therefore, section 8 of the Act of 1937, being a procedural statute, and presumptions being simply rules of

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evidence in which no litigant has a vested right, under the foregoing decisions, does not offend against the Constitution of the United States. The Act of 1937 in itself being not unconstitutional then the action of the Pennsylvania Supreme Court in applying it to the case at bar, under the circumstances, as they existed in this case and were of record, could not be unconstitutional.

In his Petition for Reargument the Petitioner urged that section 8 of the Act of 1937 was a violation of article III., section 7, of the Pennsylvania Constitution which provides among other things:

“The General Assembly shall not pass any local or special law: * * *

Regulating the practice or jurisdiction of, or changing the rules of evidence, in, any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate.”

To show that the Supreme Court of Pennsylvania did the Appellant no harm when it refused reargument and thus refused to consider whether or not the act was in accordance with the Pennsylvania Constitution, we will refer briefly to the following decisions of the Pennsylvania courts on this subject.

In order that the rule apply that the assembly shall not pass a law changing the rules of evidence, etc., such law must be a *local* or *special* law as distinguished from a

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general law. If the Act is not special or local, it would not be unconstitutional.

In 1937, the Pennsylvania Legislature passed a companion act to the Labor Anti-Injunction Law, known as the Pennsylvania Labor Relations Act, adopted June 1, 1937, P. L. 68, 43 PS section 211. This Act was attacked as unconstitutional in the case of *Emp. of Local 134 v. Grant Co.*, 341 Pa. 70 (17 A2d 614), and the Supreme Court of Pennsylvania decided (p. 615) that the said Pennsylvania Labor Relations Act was general and not special legislation. The Labor Relations Act took away from labor unions and employers many rights in that among other things it subjected them to the authority of the Labor Relations Board. This Act most certainly might be considered special legislation with more reason than the Labor Anti-Injunction Act and particularly section 8 thereof, but the Supreme Court held otherwise and it is the last authority on that question. The general law as to special legislation is set out in the case of *Seabolt v. Commissioners*, 187 Pa. 118 (40 A. 818) at 323 as follows:

"Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification."

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The Act of 1937 not being "special legislation", none of the provisions of article III., section 7, apply.

Finally, the petitioner in his Brief (p. 32) has called attention to the provisions of the Federal Anti-Injunction Act (Norris-LaGuardia Act) stating particularly that the latter does not contain the phrase to which he objects so strenuously, namely, "And without the aid of any presumptions of law or fact". The Federal Act does not contain said phrase, but it does state that no officer or member or association shall be responsible for the unlawful acts of individual officers, members or agents, "*except upon clear proof of actual participation in, or actual authorization of, such acts after actual knowledge thereof.*" Requiring clear proof of actual participation, actual authorization, or ratification after actual knowledge, should be just as objectionable as the proof required by the Pennsylvania Labor Anti-Injunction Act, but petitioner does not find it so. In fact, he could not legally object because Section 6 of the Federal Act was specifically upheld by this Court in the case of *United Brotherhood, etc. v. United States*, 67 Supreme Ct. 775 (adv. sheet) March 10, 1947, from which we quote as follows:

"We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or member, charged with responsibility for the offense, actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.

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Thus section 6 limited responsibility for acts of a co-conspirator—a matter of moment to the advocates of the bill. Before the enactment of section 6, when a conspiracy between labor unions and their members, prohibited under the Sherman Act, was established, a widely publicized case had held both the unions and their members liable for all overt acts of their co-conspirators. This liability resulted whether the members or the unions approved of the acts or not or whether or not the acts were offenses under the criminal law. While of course participants in a conspiracy that is covered by section 6 are not immunized from responsibility for authorized acts in furtherance of such a conspiracy, they now are protected against liability for unauthorized illegal acts of other participants in the conspiracy.” (p. 780)

“We hold, therefore, that ‘authorization’ as used in section 6 means something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. We are of the opinion that the requirement of ‘Authorization’ restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or

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necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence." (p. 781)

The purpose of this section of the federal law is stated thus in the Senate Report, No. 163, p. 19, 20, 72d Congress, 1st Session; and it might with propriety be applied to Sec. 8 of the Pennsylvania Act:

"It is not the intention of the bill to protect anybody, whether he be employer or employee, from punishment for the commission of unlawful acts either as against property or person. But no person or organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it. * * * It is high time that, by legislative action, the courts should be required to uphold the long-established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability.

"There has been a distinct conflict of opinion in the courts as to the degree of proof required. Mere ex parte affidavits establishing a certain amount of lawless conduct in the prosecution of a strike have been held in some instances to establish a 'presumption' that the entire union and its officers were engaged in an

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unlawful conspiracy; and, on the other hand, other courts have declined thus to substitute inference for proof, (and have rejected such a doctrine). . . .

"It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter in Federal Courts. That is the only object of section 6."

We respectfully pray the Court, therefore, to dismiss the Petition for Writs of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

CHARLES J. MARGIOTTI,

BEN PAUL JUBELIRER,

MARGIOTTI & CASEY,

*Attorneys for Respondents, Local
Union 249, and Its Officers.*